Agreements for the Continuance of the Personal Company Despite the Death of the Partner and the Legal Rights of the Successor in Greek Company Law

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Abstract

The purpose of this paper is the question of the validity of agreements to continue the partnership by the heirs of the deceased partner, the transfer of shareholding/ shares in partnerships due to succession, accountability of heirs for the debts of the company, and the legal position of the minor heir's liability against corporate lenders. The study focuses on addressing these issues, which are due to the lack of full regulation and the conflict created in the provisions of inheritance and partnership law in Greek Law.

Keywords: transfer participation/share, hereditary succession, accountability of heir, partnership, limited partnership.

A. The Matter As It Stands

The idiosyncratic legitimate right of the partner participation in a company together with the company contract, with its broad formation of agreements for the continuance of a personal company after the death of a partner, creates problems as to the subject of hereditary succession, the fate of the deceased partner's heirs and their position and rights against the company. Specifically, the Law with its obscure phrasing in Article 1710 Section 1 of the Greek Civil Code (GCC)[1] with the term *Property*, does not determine which obligations are inheritable and which are not, and whether matters concerning the company partnership can be brought under this relevant provision. Also, the new Article 265 of Law 4072/2012[2] does not stipulate the obligations, which the heir partner has against

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1 Section 1710. *Notion.* Upon the demise of a person, his patrimonium as a whole (estate) shall be transmitted by virtue of the law or of a testament to one or more persons (heirs).

A devolution by succession in virtue of the law shall intervene where there is no testament or where a devolution by virtue of a testament has been frustrated in whole or in part.

2 Assuming the continuity of the company with the deceased partner's heirs, each heir can stay in the company if they take the place of a limited partner. If the partners do not accept the proposal, the heir may leave the company.

the company creditors, and as a result a series of unanswered questions are born as to the extent of the obligations the heir partner has towards the company.

From the above essential ascertainments, there arise many difficult problems and significant interpretative issues. For these reasons, the following queries are put forward:

Firstly, whether the share in partnership, which includes property, personal and administrative rights, constitutes an object of hereditary succession under the provision of Article 1710 GCC.

Secondly, what the validity of the contracts are, which govern the fate of the deceased partner's participation in partnership and the rights of the heirs against the company, especially when the contract is put into practice under the framework of Article 368 GCC.[3]

Thirdly, how the heir is to be held accountable for the deceased partner's company debts. On this point, there is uncertainty as to whether conflicts arise in the provisions of Hereditary Law with the provisions 249 and 279 of Law 4072/2012 (GCommC).

Fourthly, in the case where the heir is a minor, how will he come into the company and whether his responsibilities are restricted or unrestricted.

The controversy for the solution to the above problems has begun from way back, so much so in theory,[4] as in jurisprudence,[5] and continues even today. The

3 Section 368. *Contract relating to the succession of a living person.* A contract having for its object the succession of a living person concluded either with such person or with a third party and relating either to the whole or to a portion of the succession shall be void. The same rule shall apply with regard to a contract purporting to limit the freedom of disposition by last will.

4 *See,* Rokas, *Commercial Companies* (6th edn.), 2008, p. 103; N. Rokas, *Die Teilhaberschaft an der OHG und ihre Verebung,* 1965, p. 103; Perakis, *The General Part of Business Law,* 1999, § 67, p. 378, note 78 with bibliographical references; Georgakopoulos, *Corporate Law – Partnerships,* 1965, p. 350; Markou, *Manual of Commercial Law, Personal Companies,* B', specific section, 2010, p. 97; Anastasiades, *Greek Commercial Law,* 1949, 5th edn., p. 249; Andonopoulos, *Law of Partnership,* 2007, p. 119; Alexandridou, *The Law of Personal Companies,* issue A' Personal Companies, B' ed. 2007, p. 142; Selekos, 'Dissolution of the General Partnership with the Death of a Partner. Entry of Heirs into the Company and its Revival', *Episkopisi Emporikou Dikaiou (Commercial Law Review),* 1997, p. 555; *ibid., in Dikaio Prosopikon Eterion (Law of Personal Companies),* Vol. I, 2001, § 9, Art. 13, § 10, Art. 76-80; K. Rokas, 'Advisory Opinion', *Nomiko Vima (Law Tribune),* 1953, p. 1065; Rammos, Lidzeropoulos & Tsiridanis, 'Advisory Opinion', *Review of Commercial Law,* 1964, p. 216; Pamboukis, Due to reason of Death the Transfer to the Association the Share of the General Partner, Advisory Opinion, Armenopoulos, 1975, p. 561 Argyriadis, Advisory Opinion, *Nomiko Vima (Law Tribune),* 1953, p. 449; Kiandou-Pamboukis, *The Provision for the Continuation of the Personal Company with every one of the Majority of Heirs of the Deceased Partner,* Armenopoulos, 1960, p. 245; Leibisch Arnold, 'Über die Rechtstellung des Erben eines offenen Handelsgesellschafters', 116 *ZHR* 1953, p. 55; Marotzke Wolfgang, 'Die Mitgliedschaft in einer offenen Handelsgesellschaft als Gegenstand der Testamentvollstreckung', 1986 *JZ,* p. 457.

5 AP (Greek Supreme Court) 551/1995, *Epitheorisi Emporikou Dikaiou (Review of Commercial Law),* 1995, p. 601, with note by N. Rokas; Ef. Ath. (Athens Court of Appeals) 7689/1995, *Episkopisi Emporikou Dikaiou,* 1996 with comment by Selekou; Ef. Thess (Thessaloniki Court of Appeals) 321/1964; Armenopoulos, 1965, p. 961 with comment by B. Kiandou; Ef. Ath. (Athens Court of Appeals) 121/1964, *Ephemeris Ellenon Nomikon (Greek Lawyers Journal)* 1964, p. 294; Ef. Thess (Thessaloniki Court of Appeals) 599/2007, Armenopoulos 2007, p. 1521; One-Member District Court of Thessaloniki 10347/2010 and 10538/2010, Bank of Legal Information/Bar Association of Athens.

deadlock caused by these problems is, to a large extent, due to the conflict of the provisions of Hereditary Law and the Law of Personal Companies.

B. The Legal Nature of the Company Participation in a Partnership

The company participation as a group of administrative and property rights constitutes a complete, unified and unbreakable asset. Under this implication, certain property or administrative rights cannot be detached and transferred independently from the entirety of the participation in a partnership. The Greek Civil Code (GCC) forbids the transfer of certain company rights to third parties without actually transferring the whole of the company participation.[6] The company participation is made up of a particular category of rights and constitutes the right on the value of the company property.[7] It comprises of a universal and absolute right, which is transferred in a unified action in its entirety, according to the principle of the indivisibility of the company participation, which is in force in the personal companies.[8] The transfer of the universal right in one action means that with the transfer of the company participation, all the relevant rights and obligations are transferred, without requiring a separate concession of rights and the assumption of obligations.[9] A consequence of the absolute characteristic of company participation is that a potential infringement on the right by the company generates claims against the company and against the company organs, according to Articles 71 and 914 GCC.[10]

C. Company Participation as an Object of Hereditary Succession

The legal theory is ambiguous when the rights of the partner, who acquires both property and personal rights, can constitute object of hereditary succession under Article 1710 GCC.

The transfer of a legitimate relation as a result of death can be entered into only if one of the following conditions are concurrent: (a) the legitimate relation must be placed interpretively amongst the *property* of the individual as implied in Article 1710 Section 1 GCC, (b) the legitimate relation should be made as an

6 Rokas, 2008, p. 65; Andonopoulos, 2007, p. 164.

7 Rokas, 1965, p. 23 and notes 40, 41.

8 *See ibid.* p. 22; Rokas, 2008, p. 94 'because the indivisibility of the company share is not an obligatory law, its partial transference is allowed'; Liakopoulos, *From a Civil to a Capital Company*, 2000, p. 7, notes 7-9; Andonopoulos, 2007, pp. 123-124; Soufleros, *The Limited Partnership: Contribution to the Law of Companies*, 2003 150 note 440.

9 Rokas, 1965, p. 22; Selekos, 1997, § 9, Art. 15.

10 Section 71. *Responsibility of juristic person.* A juristic person shall be liable for the deeds acts or omissions of the organ which represents it to the extent that such deeds acts or omissions have taken place in the course of the performance of the duties entrusted to the organ and that such deeds acts or omissions have entailed an obligation to repair. Further the individual responsible shall be liable for the whole of the prejudice. Section 914. *Notion.* A person who through his fault has caused in a manner contrary to the law prejudice to another shall be liable for compensation. *See*, Andonopoulos, 2007, p. 123 No. 25; Rokas, 1965, p. 22.

explicit provision in the law as a transfer and (c) the legitimate relation should be determined by contract or in the will as inheritable, provided the law allows for it.[11]

The provision in Article 1710 Section 1 GCC, which expresses Universal succession, presents in its phrasing imperfections and interpretive hindrances, as it does not included all the legitimate relations. The term *property* in this particular provision refers mainly to legitimate relations with property value, namely a monetary pay off of the legitimate assets of the testator and not the personal rights of the deceased, which are not inheritable. The matters of interpretation, which come about in Article 1710 Section 1 GCC are supplemented with the provision of Article 1901(1) GCC.[12] With the last above provision, all the more so, the desire of the deceased partner or and a contract can, according to the situation, make an uninherited relation into an inheritable one.[13] Consequently, all the above provisions are considered to constitute a complete entirety, which determines the company participation as an object of hereditary succession.

The heir succeeds the deceased in all the rights (Art. 1710 Section 1 GCC), in all the obligations (Art.1901 (1) GCC) and in all the rest of the legal relations, such as the company relations (Art. 773 (2) GCC). The heir enters into the whole of the legal relations of the deceased partner, that is, he enters into the company as a full partner to the rights and obligations of the company participation, provided of course it exists as proviso in the company contract for the continuation of the company.[14] Another point of view, which wants only the property rights to be considered an object of hereditary succession and not the personal rights, which would be written-off with the death of the partner and then would be revived with the advent of the new partner, would be at variance with the principle of the indivisibility of the company participation.[15] In addition, for the liquidation of the personal company rights of the deceased partner and the creation of a new company in the person of the heir, it would be necessary for the lifting of the uninheritability of the partner's rights and a contract of employment.[16] Such an action would come into conflict with the provision in Article 1710(1) GCC, because according to this relevant article, succession comes automatically *in one action* to the heir, that is to say, with the death of the devisor, without any other action or formality and without any lapse of an interval of time and without any

11 Georgiades, in Georgiades-Stathopoulos, *Civil Code*. Article-by-article Commentary, Vol. I: General Principles, 1978, Art. 1710, n. 42.

12 Section 1901. Liability of ordinary heir. An heir shall be liable even to the extent of his own patrimonium for the debts of the succession. Legacies and charges shall be discharged after the other obligations.

13 Georgiades, 1978, Art. 41; Skouras, *The Legal Regulation for the Liquidation of the General Partnership*, 1979, p. 183; Selekos, 1997, p. 559.

14 C. Rokas, *The Commercial Entity of the General Partner*, Study I/1971, p. 39; Selekos, 2001, § 10, No. 82.

15 *See* Skouras, 1979, p. 176; Liakopoulos, 2000, p. 7.

16 Skouras, 1979, p. 177, notes 58 and 70; For the definition of contract signing *see* Markou, *Enchiridion Emborikou Dikaiou* (*Manual on Commercial Law*), Personal Commercial Companies, 2010, § 3 (d) p. 99 and note 347.

other person between the heir and the testator/devisor.[17] Furthermore, such a position would also be in conflict with the contents of provisions in Articles 256 and 265 of Law 4072/2012, because the company participation of the deceased partner is transferred to the heir, as a complete whole of property and personal rights and is rendered an object of hereditary succession.[18]

Therefore, we can infer that company participation comes under the provision of Article 1710 Section 1 GCC and is an object of hereditary succession.

D. The Transfer of a Company Participation/Share in Partnership Through Death

In the former provisions the death of a general or silent partner had repercussions on the existence of a company which constituted reason for its dissolution. With the new Article 260 of Law 4072/2012 the death of the general partner does not constitute reason for termination of a partnership, as in civil companies without legal entity (Article 773-774 GCL), but constitutes a reason which leads to the exit from the company, unless otherwise provided by the partnership agreement. Also, in civil companies without legal entity, company participation in a partnership is, according to the rules, non-transferable, except if there exists a contrasting agreement in the company contract, which then renders it inheritable.[19] Conversely, in general and limited partnerships, in the new Article 256 of Law 4072/2012, corporate participation is transferred totally or partially, if so provided in the partnership agreement or in an agreement of all partners. If the partner is a legal entity, the dissolution of the legal entity-member alone does not bring about dissolution of the company. The dissolution of the legal entity does not equate with the death of a natural person. The dissolution of a legal entity-member brings about the dissolution of the company only with the cancelling of the legal entity and the completion of his winding up, because the legal entities cannot succeeded and the future of their property is regulated during the dissolution by other provisions (Arts. 76, 77 GCC).[20] *In German law,* the death of a partner in personal companies does not bring about the dissolution of the company, but exodus from the company, which has as a result the decrease of the number of

17 Georgiades, 1978, No. 2; Spyridakis, *Enchiridion Astikou Dikaiou* (*Manual on Civil Law*), Vol. 5, 1980, p. 7.

18 *See* Skouras, 1979, p. 177.

19 The provisions of the Civil Code are in effect in civil companies without legal entity and continue to remain valid for partnerships, with the exception of the provisions of Articles 758 and 761 of the Civil Code, provided there were no special provisions for them.

20 Section 76. The liquidation shall be conducted in accordance with the provisions applicable by analogy relating to the judicial liquidation of estates. Section 77. *Disposal of assets upon dissolution.* Unless otherwise provided in the law or in the deed of constitution or in the Articles of incorporation or unless the competent organ has decided differently the assets of the juristic person dissolved shall devolve on the State. In such event the State shall be bound to pursue by means of the assets received the realisation of the purpose of the juristic person. *See,* Rokas, 2008, p. 103, No. 5, "A death equates with the end of a legal entity member of a company"; Markou, 2010, p. 197; Anastasiadis 1949, p. 247 note 13; Andonopoulos, 2007, p. 250, No. 49.

partners and the amortization of the company relation (Section 131 (3) no 1 HGB). *In Swiss law,* the company is dissolved with the death of a partner, provided that there is not a relevant provision in the company contract for the continuance of the company by heirs (OR 545). In *American law,* the death of a partner does not bring about the dissolution of the company but its split up, its dissociation.[21]

E. Types of Agreements for the Continuance of the Company despite the Death of the Partner

With the new Article 265 of Law 4072/2012, assuming continuity of the company with the deceased partner's heirs, each heir can stay in the company if they take the place of a limited partner. If the partners do not accept this proposal, the heir may leave the company. The basic types of contracts for the continuance of a company can be: (a) the company continues only with the other partners and (b) or there is an agreement that the company will continue together with the living/other partners and the heirs of the deceased. A requirement for a valid transference of the company participation is the existence of a provision in the statute of the company or an agreement between all the partners, which will allow the free or under certain conditions transfer of the company participation, in either case there follows a modification of the company statutes.[22]

I. Agreement of Continuance between the Other Partners and the Heirs (Certain Members or All) of the Deceased Partner

In the company contract, it can be agreed and the stipulation is valid that the company will continue (not that it can continue)[23] (*jure hereditario*) to function after the death of one of the other partners and the heirs (or the beneficiaries[24]) of the deceased or to certain heirs of the deceased partner (Art. 265 of Law

21 Under IUPA (1971), almost any departure of a partner results in a technical dissolution of the partnership even where the partnership business is not actually wound up. Under IUPA (1998), and consistent with the entity theory of partnership, many events that would trigger partnership dissolution under IUPA (1971), *e.g.*, the departure of a partner through death, voluntary withdrawal, retirement, bankruptcy, and the like, now instead trigger only dissociation of the departed partner. Iowa Code section 486A.601 enumerates events that cause a partner's dissociation. These events generally track the traditional causes of dissolution under JUPA (1971). Some are voluntary, *e.g.*, withdrawal by express will of a partner, but most are involuntary, *e.g.*, expulsion by partner vote or per judicial determination, insolvency, death or incapacity, and the like. The partnership agreement may expand or, with one exception, contract this list. As under IUPA (1971), a partner's dissociation may be wrongful if in violation of the partnership agreement and in certain other situations, triggering liability to the partnership and other partners for damages caused.

22 Andonopoulos, 2007, p. 252, No. 54.

23 Georgiadis, 1978, Art. 66 "... because in this case it does not concern hereditary succession but the setting up of a new company relation between the rest of the partners and the heirs of the deceased partner..."

24 Andonopoulos, 2007, p. 121, No. 21, also at p. 253, No. 56, notes 133 and 134, with references to the law; Pamboukis, Advisory Opinion, Armenopoulos, 1975, p. 563.

4072/2012). If the company continues to function only with one or certain heirs, the company participation is limited inheritable (*partial succession*).[25] In this instance, the heir partner is obliged to pay in money the rest of the coheirs a percentage of the value of the partnership portion, which would be entitled if the company continued only between the other living partners.[26] The company contract can provide formally or implicitly[27] that, the partner can be succeeded by his heirs with full right the whole duration of his participation or not after his death. The continuance of the company can come about by the nature of the contract, the aim and the object of the company. This agreement exists as an *agreement of business law* and is binding for the rest of the partners, the heirs and the third parties as to the continuation of the company.[28] The clause that refers to the continuance of the company does not refer to the administrative rights of the deceased partner. If the deceased partner had the statuteable administration of the company as provided by the articles of association (Art. 748 Section 1 GCC), then this capacity of this partner is transferred to the heirs. His other capacity as administrator is not transferred to the heirs, unless this exists in an explicit agreement.[29] The heir comes into the company with full right, according to the rules of hereditary succession as a whole partner, in the complete company position of the deceased partner, which is so much in his property rights as in his personal rights.[30] As a consequence of this heir's right of coming into the company, the advent of the company's continuation does not need to be made public by the heirs.

The agreement for the continuation of the company can be contractual or subsequent. The agreement should be drawn up either in the initial contract of the company or with a subsequent agreement, which will be constituted in either event before the death of the partner. An agreement after the death of a partner would mean the creation of a new company, since the old company, which was dissolved by full right with the death of one of the partners, could not be recov-

25 Rokas, 2008, p. 105; Rokas, 1965 (*see* Die Fortsetzung mit einem bzw. Einigen von merhreren Erben), pp. 73 and 81, "the partial succession of the company share is allowed as a deviation from the provisions of the German hereditary law and with the reasoning of § 139 HGB (the continuation of the company only after the living). According to the ratio Legis of this specific provision, the company can be continued and with a few of the heirs", But *see* Georgakopoulos, 1965, p. 350.

26 Rokas, 2008, p. 105.

27 Argyriadis, 1953, p. 449; Georgakopoulos, 1965, p. 344; Kiandou-Pambouki, 1960, p. 247. But *see* Anastasiadis, 1949, p. 250.

28 Ef. Thess (Thessaloniki Court of Appeals) 599/2007, Armenopoulos 2007, p. 1525 with comments by Behlivani.

29 Andonopoulos, 2007, p. 255 'a statuteable business can... be considered transferable'. *See also* note 144.

30 Georgakopoulos, 1965, p. 143; Rokas, 195, p. 57, note 12 (*see* §14. Kritische Würdigung der Lehre von der Unfähigkeit der Miterbengemeinsfchaft, Die Teilhaberschaft in einer OHG zu erwerben; Georgiadis, 1978, Art. 67.

ered with such an agreement.[31] The above observation has a practical implication, because the eventuality of such an agreement would have as a consequence the obligation for the observance of the formalities for the setting up of a new company.[32] It refers, therefore, to the continuation of the operation of the company and not to its renewal, as occurs in Article 769 GCC.

The validity of the clause is doubtful in the company contract when *a third party who is not associated with the deceased partner* is bound by a provision in the last will to come into the company and to handover to the heirs the participation of the deceased partner. Such an obligation would be possible and could be imposed as a pledge on behalf of the third party (Art. 410 GCC)[33] or as a promise to release the living partners (Art. 478 GCC) from their obligation towards the heirs or as accumulative succession (Art. 477 GCC)[34] without absolving the obligations of the living partners towards the heirs.[35] Crucial is the matter of the future of the company within the duration of the time-limit of the declaration for the continuance of the company and to exercise one's right of choice (dissolution of the company due to the egress of the heirs or succession in the share of the deceased) either from the living partners or from the heirs of the deceased partner. According to sound opinion in this case, the company should be considered to perpetuate under the annulling clause retroactive and consequently the heirs maintain the share of the deceased partner under the same clause, without which outcome of the clause affecting the rights of the bona fide third parties. In the case that the annulling clause is carried out, the partners and the managers are mutually responsible in the obligation of liquidation of the mutual obligations of the company as if the annulling clause had been paid up from the beginning.[36] According to another view, a company is considered dissolved with the death of the devisor partner and performs in liquidation. The exercise of the right of choice has as a result the revival of the company. Furthermore, if the heirs accept the possible continuation, their acceptance is traced back to the period when the inheritance was acquired.[37]

31 Anastasiadis, 1949, § 87, p. 249: "the agreement for the continuation of the company has to exist before the death of a partner because alternatively the creation of a new company is recommended". Tsiridanis, *Elements of Commercial Law*, Vol. II (6th edn), 1964, § 69, III. But *see*, Rokas, 2008, p. 93, p. 103 note 8, an agreement after the death of a partner is sufficient as long as the living partners and the heirs agree; Andonopoulos, 2007, p. 252, No. 54: "This agreement...can be drawn up after the death of a partner, where only then will need to...revive the company which has dissolved due the death".

32 Anastiasiadis, *Ellinikon Emporikon dikaion* (*Greek Commercial Law*), Vol. I/1937 (4th edn), § 87, p. 293.

33 Section 410. Stipulation for the benefit of a third party. If a person has accepted a promise of performance in favour of a third party such person may demand that the promissor pay to the third party.

34 Section 477. Cumulative assumption of debt. If a person has by contract concluded with a creditor promised payment of the debt of a third party the debtor shall not be released but an additional obligation shall be created and borne by the promissor unless a contrary conclusion results clearly.

35 Georgakopoulos, 1965, p. 350.

36 *Ibid*, p. 349.

37 Triandafillopoulos, Maridakis & Gounarakis, 1931, p. 636.

If the company contract does not contain a provision for the continuation of the company the dissolution of the company is followed by liquidation (Art. 777 GCC).[38] The heirs of the deceased partner come into the company, which has gone into liquidation as full partners; in other words, there occurs succession in the whole company relation.

II. Agreement for the Continuation of the Company Only Between the Living Partners with the Exclusion of the Heirs

The provision in the statute of the company for the continuation of the company with only the living partners and the exclusion of the heirs is valid. If the members of the company are more than two and one dies, then the personal company can be continued by the rest of the partners, when of course the heirs of the deceased partner have been compensated and as long as this has been provided for by the statute of the company. If the company has only two partners and the one partner dies, the continuation of this company is possible today, due to the new Article 267 of Law 4072/2012 (one man company)[39]. The questions raised are what type of claims the heirs of the deceased partner have and whether bound parties are only the living partners or and the company. According to one view, the above agreement should be interpreted as follows: The legal fate of the deceased, in other words, the smallest percentage of his company participation, which is defined by the law (Art. 1825 GCC),[40] will be allotted to the living partners by analogy of their share in the company with the simultaneous obligation of every single partner and by the same analogy the pecuniary compensation to the heirs of the deceased. In an adverse circumstance the materialization of the restitution of the company participation of the deceased partner to the heirs would lead to the dissolution of the company and distribution of the common property.[41] According to another more accurate view on the matter in question is that there should be a distinction made between companies without legal entity

38 Section 777. *Liquidation.* A partnership shall be deemed existing even after its dissolution to the extent that such existence is necessary for the requirements and in view of the dissolution. The attributions of the managing partners shall cease as from the dissolution.

39 *See* Sotiropoulos, *In Dikaio Prosopikon Eterion* (*Law of Personal Companies*), Vol. I. 2001 (Supplement) No. 9; Selekos, 2001, § 10, No. 103; Markou, 2010, p. 95, note 719; Albanidi, 'The Problematic Issues of a Two Member Company', *Dikaio Emporikon Etairion* (*Law of Commercial Companies*), 2005, p. 1168.

40 Section 1825. *Portion.* The descendants and parents of a principal as well as the surviving spouse thereof who would have been called as heirs in an intestacy shall be entitled to a compulsory portion in the estate. The compulsory portion shall consist of one half of the portion devolving in an intestacy.

41 Anastasiades, 1949, 5th edn, § 87, p. 249: "... and an agreement for an extension of the duration of the company would not be beneficial".

(Art. 741 GCC[42] *et seq.*, Art. 758 GCC[43]) and companies with legal entity (Art. 784 GCC).[44] In the first case, where the property of the company belongs jointly to all the partners due to the existence of community between them, then there should be accepted extra time for the duration of the company. Namely, the universal heirs of the deceased partner should be obliged not to ask for the distribution of the common property until the expiration of the time of the company, which should not surpass a period of ten years (Art. 795 Section 2 GCC).[45] During the entire time period, when the mandatory community of the heirs of the deceased will hold with the rest of the partners, the first can ask for the fruits of the common things (Art. 786 GCC) with disbursement of the maintenance expenses from their part. Also, the heirs will not have the right to dispose of the participation of the deceased partner (Art. 761 GCC).[46] In the second case, presuming that the property belongs to a legal entity and not to the partners, such an agreement will have as a result the increment of the company participation of the living partners with the simultaneous compensation to the heirs of the deceased partner.[47] Specifically, the heirs have the right to receive everything that they would have if the company were liquidated under the provision Article 771 GCC.[48] The heirs of the deceased will have a contractual claim against the company (or) and against the living partners for the disbursement to them in money the value of the deceased

42 Section 741. *Notion.* By the contract of partnership two or more persons bind themselves reciprocally to pursue by means of common contributions a common aim especially of economic nature.

43 Section 758. *Right to contribution or acquisitions.* The contributions of the partners as well as anything that has been acquired through the conduct of the partnership's business for its account shall belong to all the partners in proportion to the share of each in the partnership. Anything that a managing partner has in the course of his representation of the partnership acquired in his own name he shall be bound to make common property of all the partners in proportion to the share of each in the partnership.

44 Section 784. *Juristic personality of civil partnership.* A partnership governed by the provisions of this Chapter shall to the extent that it pursues an economic aim acquire juristic personality provided that the conditions of publicity relating to joint and several partnerships as laid down in the law have been observed. The juristic personality acquired by such a civil partnership shall be maintained until termination of the liquidation and for the purposes thereof.

45 Section 795. *Right to terminate coparcenary.* Each of the coparceners shall be entitled at any time to demand the cessation of the coparcenary to the extent that such right has not been excluded by a deed or by the assignment of the common thing to the realization of a permanent purpose. A deed may only exclude the cessation of coparcenary for a period of up to ten years.

46 Section 761. *Share in partnership non-transferable.* Each of the partners shall until termination of the liquidation of the partnership be under an obligation vis-a-vis the others not to dispose of his share in the common property. He shall not be entitled either to demand prior to the termination of the liquidation the distribution of the common property. *See*, Kafkas, *Law of Obligations*, Vol. B, (3rd edn), 1961, p. 155.

47 Rokas, 2008, p. 104, § 13 II 3, p. 99; Georgakopoulos, 1965, p. 344.

48 Vallinidas, *Civil code. Interpretation, Vol. I, General Principles*, 1946, Art. 773 GCC, p. 155.

partner's participation.[49] The disbursement will be equal in value of the participation of the devise partner and the company things, namely the acquisitions received from the administration during the operation of the company, presuming that the contribution of the deceased will be given to them always in money. Otherwise, the continuation of the company between the other partners would not be possible, if the heirs of the deceased exercised their rights for the self-same restitution of the participation.[50] Specifically for the assessment of the value of the company participation of the deceased partner the legal entity will be regarded as perpetuating in liquidation. Firstly, an inventory of the company's property must be drawn up, that is, the assets and liabilities of the company must be calculated and from their comparison, the real remaining property of the company can be deduced. The heirs cannot demand a part of the profits, which the company attained from the last inventory, until the death of the partner, and they are not burdened with the possible losses of the company.[51]

III. Agreement for Continuation of the Company between the Living Partners and Third Parties with the Exclusion of the Heirs

A provision in the company contract is valid that in the case a partner dies, the rest of the partners can continue the company by compensating the heirs with the share of the deceased partner and granting to a third party (non-heir) rights of entrance into the company, with the same conditions as the deceased partner. This case does not concern a hereditary succession, but a transfer, which is equal to it, and for a result, which is not prohibited.

IV. The Validity of the Clause, Which Determines the Heirs in the Company Contract and the Provision of Article 368 GCC

An issue incurs for the validity of the agreement in the company contract for the continuance of the company with specific heirs (in community or with one or a few of them). The question, which arises is whether the determination of the heir in the company contract has the characteristic of a hereditary contract and runs contrary to the provision of Article 368 GCC, which forbids the contracts for the succession of a person who lives with either the same or a third person, either for the whole succession or for a percentage of it.

According to one view, the heir of the company participation will have to be designated by the devisor with a provision of last will (with a will or intestate), because in a different case, the company contract would be a hereditary contract, which is forbidden under Article 368 GCC. Such a provision in the company con-

49 Ef. Thess (Thessaloniki Court of Appeals) 599/2007, Armenopoulos 2007, p. 1525 with comments by Behlivani; Alexandridou, 2007, p. 191 No. 15; Georgiadis-Stathopoulos GCC 1710, No. 67 "the heirs of the deceased...have a claim against the company...and for the arrear profits, as if they were the deceased exiting partner"; Anastasiadis, 1949, p. 251 note 18 "the heirs simply have an obligatory claim as to the withdrawal of the deceased's share and not the propriety of the destiny of it"; Markou, 2010, p. 197, note 727.

50 Kafkas, 1961, p. 155.

51 *See*, Anastasiadis, 1949, p. 252 note 19; Rokas, 2008, § 13 II 3, p. 99 and pp. 104; Georgakopoulos, 1965, p. 344.

tract would be invalid because it has to do with a hereditary contract.[52] According to this view, without a clause of last will and testament, the determined successor to the company participation will not receive anything, but without him, the rest of the heirs are not in a position to continue in the company capacity.[53]

According to a more sound view, such a provision does not constitute a hereditary contract. The agreement in the company contract that the company will continue to function between the living partners and designated heirs, such as the heirs by testamentary succession, heirs by intestate succession or and those heirs which are appointed, will not be contrary to Article 368 GCC.[54] And this is for the following reasons, (a) the specific provision in the company contract refers to definite property assets, namely the company participation and not the whole or the percentage of the inheritance of the living, (b) the contract with which a person promises to the covenantee certain benefits which have to be disbursed at the time of death of the pledger and has an onerous cause and not a gratuitous cause, and an exchange is submitted for the dereliction of the self-same hereditary share of the deceased partner.[55] In reality the acquisition of the company share materializes indirectly with the contract in favour of the third person. Such contracts of the devisor by onerous cause are valid as long as the Civil Code allows in the wider sense a gift as a cause of death (Art. 2032 GCC) with which the contracting parties can attain everything the devisor cannot accomplish via the way of the prohibited hereditary contract.[56] Therefore, such a type of onerous presentation of the property assets of the devisor cannot fall under the intendment of Article 368 GCC.

Also, an issue arises when the partner does not designate totally the successor to his share of participation or if there arises a successor from the hereditary law outside of those who have been accepted by his partners or if the heir does not meet all the requirements of the company contract.

In these circumstances the issue is raised due to Article 368 GCC and can be solved only with the granted choice of the living partners: either to continue the company with the unforeseen heirs, or to continue without them with their being compensated within a justifiable time period, or to dissolve the company. And this last solution requires the arduous necessary unanimity of all the partners.[57]

In the context of these basic forms of agreements, for the continuance of the company, the company contract can foresee several other combinations.

52 *See* for Hereditary Contracts Georgiadis, 1965, nos. 18-23.

53 Georgakopoulos, 1965, p. 347.

54 Rammos, Litzeropoulos & Tsiridanis, 1964, p. 280; Kafkas, 1961, p. 152.

55 Rammos, Litzeropoulos & Tsiridanis, 1964, p. 280; *see* Criticism on this Georgakopoulos, 1964, p. 347, note 840; Andonopoulos, 2007, p. 254; Kiandou-Pambouki, 1960, p. 245; Rokas, 2008, No. 7, p. 105.

56 Rammos, Litzeropoulos & Tsiridanis, 1964, p. 282; Litzeropoulos, Interpretation of the Civil Code, Introduction, 1950, Introductory Observations on Articles. 410-415, No. 17.

57 Georgakopoulos, 1965, p. 347.

F. The Legal Place of the Heir in the Personal Company

If an agreement between the living partners and the heirs (all or certain of them) exists for the continuation of the company, then the heirs come into ipso/ipso jure in the place of the deceased partner, because they are heirs jure hereditario.[58] The heirs with devolution by succession acquire with full right the succession (GCC 1846) and replace the position and the company participation of the deceased partner (either as a co-partner or as a sleeping partner). The heir comes into the company with the strength of his hereditary right and of course into the deceased partner's complete legitimate relation without being obliged to an expressed or tacit declaration of will for the continuance of the company. This means that the heir's entrance into the company does not come about by the law, but by his own right from his hereditary capacity and according to the provisions of hereditary law and not of commercial law.[59] From the moment the heir accepts the succession, the content of the company contract is binding for the heirs as well as the rest of the heirs as to the continuance of the company. Of course, the heirs always have the freedom to renunciate all of the succession, in which case naturally they do not become partners. If all the heirs renunciate the succession (GCC 1847), then the company will be considered dissolved. From the provision of the GCC 1847 Section 1 section a' the heir can renunciate the succession within the time span of four months, which begins from when he learned of the devolution (from the information of the existence of the real and legal requirements of the rightful acquisition of the inheritance) and its promise (summons to the inheritance either by will or by law).[60] Before this point, the 4-month time limit does not begin to run. The above principle by which the heir comes into rightfully the place of the deceased partner has great practical implications. The provisions of the Law of Succession are implemented and not the provisions of Commercial Law. Therefore, with the provisions of the Common (Hereditary) Law as a basis, the problems, which arise, are solved by the agreement for the continuation of the company and the matters concerning the responsibilities of the heir.

G. The Responsibilities of the Heir for the Liabilities Inherited

The company share transferred to the heir can be accompanied with liabilities. The responsibility of the successor begins as soon as he acquires the company capacity, which the deceased had with the company.[61]

58 Andonopoulos, 2007, p. 254, No. 57.

59 K. Rokas, *The Continuation of a Company with Minor Heirs*, Study I/1971, p. 170; Rokas, Advisory Opinion, 1953, p. 1066; Ef. Thess(Thessaloniki Court of Appeals) 599/2007; Arm. 2007, p. 1525; Skouras, 1997, p. 181; Perakis, 1999, § 67, p. 378.

60 One-Member District Court of Thessaloniki 10347/2010; Trapeza Nomikon Pliroforion (Bank of Legal Information)/DSA (Bar Association of Athens) (replacement of an administrator o.e.).

61 Andonopoulos, 2007, p. 214, No. 26 and p. 218, No. 31.

The company participation as property of the deceased partner causes confusion due to the succession of the personal property of the divisor. The meaning of the property of the heir is accountable to all his creditors, private and creditors of the estate. As a consequence of this event, there appears conflict of interests between the heir, the personal creditors and the creditors of the estate.

I. The Unlimited Liability of the Simple Heir Partner

The simple heir partner is liable unlimitedly (GCC 1901) for all the company's debts/liabilities and for the previous debts,[62] as the deceased partner would have, unless an opposing provision had been published in the statutes of the company.[63] If the heir is a simple heir, the creditors of the estate can be satisfied by the inheritance, concurrently together with the personal creditors of the heir, and from the personal property of the heir.

II. The Limited Liability of the Heir Partner

The heir who is not willing to accept these debts is obliged to decline the inheritance or to accept it with the benefit of inventory (GCC 1902). If the heir accepts the inheritance with the benefit of inventory, he can reduce his liabilities. The heir's acquisition of the inheritance by benefit of inventory means that the creditors of the inheritance (and not his personal creditors) can be satisfied only from the objects of the inheritance and they cannot take possession of objects from the personal property of the heir. The creditors of the inheritance can debar the personal creditors from the inheritance asking for the judicial liquidation of the inheritance (GCC 1913). In this case, only the first, above, is satisfied. Specifically, if the heir of the deceased partner accepts the inheritance with the benefit of inventory, he will not be liable and with his own property for the by chance company debts during the time of his entry into the company, but only for the equitable assets of the inheritance (GCC 1904 section a – liabilities *cum virbus herediditatis*) and for the subsequent debts he will have responsibilities even with his own personal property.[64] If there exists joint-heirs, they will be liable for the debts of the company divisibly.

A matter arises when a conflict exists between the liabilities of the successor heir with the provisions of Hereditary Law and with the provisions of Articles 249 and 279 of Law 4072/2012 GCommC.

The heir – as a general partner – is jointly and several liable, unlimitedly and to the whole, as was the deceased partner for the old debts, except if he had accepted the company share with the benefit of inventory (GCC 1904), whereupon he is liable up to the equitable assets of the inheritance, namely only with the whole estate of the deceased partner. In the last case the liability of the heir is limited, but it concerns the liability for the whole, that is liability of the heir towards the whole value of the company share of the deceased partner. Neverthe-

62 *See* Andonopoulos, 2007, p. 214, No. 26; Selekos, 1997, § 9, No. 21.

63 Pamboukis, *Law of Commercial Companies*, specific section, Personal Companies, 1975, p. 126.

64 Rokas, 2008, p. 104, No. 7; Andonopoulos, 2007, p. 251, No. 52 and p. 254, No. 58; Georgakopoulos, 1965, p. 345.

less, no conflict exists for the company debts in the provisions of Hereditary Law with the provision Article 249 GCommC, which concerns the unlimited and several liabilities of the partner. The conflict exists if the provisions are fictitious.[65]

(b) The liability of the heir-silent partner is limited. The heir-silent partner is liable against the creditors, as the deceased sleeping partner, limited and several. That is, the heir is liable for the whole worth of the company share of the deceased silent partner. The liability of the heir is immediate, joint and several, as is the liability of the general partners who accepted the inheritance. The creditor of the company can turn against the silent partner heir, but the sum of money he can obtain from him cannot exceed the worth of the company share of the deceased silent partner. All that has been mentioned above will apply for the silent partner in the framework of the liabilities of the heir-general partner, who accepted the inheritance with the benefit of inventory. Therefore and in the case of the heir-silent partner there is no conflict with the provisions of the Hereditary Law with the limited liability of Article 279 of Law 4072/2012.

H. The Minor/Underage Heir and His Participation in the Commercial Company

He who is able to transact is also able to carry out a commercial act. A minor who is unfit in setting up a transaction according to the Civil Code is also unfit to perform commercial acts and to obtain a commercial entity. The acquisition of a commercial entity requires legal capacity.[66]

The ability to carry out commercial acts does not always coincide with the ability to obtain the commercial entity.[67] The Commercial incapability can stem either from Civil Law or from Commercial Law. The totally unable (GCC 128) or restrictedly able (GCC129) or those taking place under privative judicial support[68] (GCC 1666-1688, GCC 775, Art. 13 of Law 2447/97) are unable to transpire in

65 *See* Markou, 2010, §7, p. 198, note 730; K. Rokas, Commentry Eemb (Review of Commercial Law), XIV, p. 57; Liakopoulos, 1978, Arts. 773-774, No. 12.

66 Rokas, 1972, p. 55.

67 Triandafillakis, Proposals on Commercial Law, 2009, p. 54; Rokas, 1972, p. 60; Perakis, 1999, §41 No. 10.

68 Skalidis, *Introduction to Commercial Law*, (5th edn), 2007 p. 206, note 1, who wants and under implied conditions those who are under judicial support to have such an ability. For the meaning of the distinction of judicial support *see* P. Agallopoulou, *Basic Principles of Civil Law*, 2004, p. 123; Barka-Adami, *Introduction to Civil Law*, 2009, p. 70.

commercial transactions and therefore unable to acquire the entity of a trader.[69] If in exceptional cases, as those where the company continues with minor heirs of the deceased partner, the commercial transactions are performed by the parent or by the representative of the minor, but this does not mean that minors obtain the commercial entity.[70] Otherwise, there would be a performance of commercial transaction without being able to give the commercial entity neither to the minor, who is unable, either to the parent or the representative or to the judicial supporter, since none of them are acting on behalf of the heir in commercial transactions.[71]

Also, the event of the enactment of the rights of a minor heir is different.

For the enactment of their rights minor heirs are represented (GCC 1510 *et seq.*, 1538, GCC 1516 Section 1 Art.1, 1523, under the limitation of GCC 1521 *et seq.*, by his two parents jointly or by the one parent, if there are the conditions provided by GCC 1513-1514, GCC 1532. In the case that any of the parents have not got or cannot undertake to enact the parental concern, they are represented by a guardian (CC 1590 f *et seq.*) under the provisions of the CC concerning Guardianship (CC 1517, 1589 *et seq.*, 1603) but also the administration of the company is subject to the formulations of CC 1516 *et seq.*, and 1615 *et seq.*, under the restrictions of CC 1624, 1625.

I. The Participation of a Minor Heir in a Commercial Company and Its Consequences

The commercial capacity of the commercial companies does not give the commercial entity to its members, in other words to its partners or shareholders, since the legal entity is an independent subject of legitimate relations, according to the principle of self-sufficiency or the separation of the legal entity from its members.[72]

According to supported belief, participation in a general partnership or a limited company gives only to the general partners the commercial entity,

69 Under previous specific provisions of commercial law a minor forfeited so much so the ability for the acquisition of the commercial entity (Commercial Law Art. 2) as the ability to engage in commercial operations (Commercial Law Art. 3). A minor was rendered able for the transaction of one or more commercial actions and the acquisition of the commercial entity of the merchant only under certain conditions: A minor as a general partner had to have completed his eighteenth year of age and must have had a license to practice commerce. He had to have previously expressed and written permission from his father. The document of the license had to be registered in the book of partners. The license to practice commerce had to be received before entering as a partner into the company, to have been referred to in the statutes of the company and to have been attached to the copy of the contract of the his release from his paternal care and liability. These formalities were required also for the participation of the limited partner. Following, Arts. 2-7 of EN were annulled from Arts. 31-33 of L.1329/83.

70 Rokas, 1972, p. 62.

71 Anastasiadis, 1949, p. 89, note 5a.

72 *See* Rokas, 2008, p. 19, no. 3.

whereas for the limited partners it constitutes a commercial transaction.[73] The limited partner is not a trader by only his participation in a limited company. The obligation of the limited partner is the commercial transaction. The limited partner carries out only commercial transactions and this act is his simple participation in a limited company under the entity of a limited partner. The commercial entity of the general partner requires the ability to be a trader, whereas for the limited partner, the ability to perform commercial transactions is sufficient.[74]

In the case that the above prerequisites are wanting from the minor heir, the question is whether the agreement for the continuation of the company is legal with him, as he enters into the company and that he is responsible for the debts of the deceased general partner.

To these questions different views have been put forward. According to the provision of Article 773 Section 3 GCC, the non-age of the heirs is not detrimental to the validity of the agreement for the continuance of the commercial company. This specific provision states explicitly that the agreement for the continuation of the company between the living partners and the heirs of the deceased is not affected by the non-age of the heirs. It's immaterial if there are one or more heirs and all or a few minors. This specific agreement consists as a specific gravity of the inheritance.[75] The minor heir with the acceptance of the inheritance comes into the company on the strength of his right to succession without any other formulation. This means that the entry of the heir into the company comes about not from the law but from his capacity to succession.[76] The minor heir comes into the whole of the company relations of the deceased partner and rightfully acquires his company participation, without needing the joint-action of his legal representative[77] and without the necessity whatsoever for an expressed or tacit declaration of will for the continuance of the company. For a minor heir to become partners they need only have the ability to legal capacity, without the requirement for commercial ability towards the action of commercial acts.[78] This result comes about despite the ability of the minor heir for the act of commercial transaction, because the obtaining of the inheritance does not require the ability to transact but the ability to law, which the minor heir does not forfeit as every

73 *Ibid.* Liakopoulos, 1978, Arts. 773-774, No. 7; But *see* K. Rokas, *The Commercial Entity of the General Partner*, Melete Emporikou Dikaiou (Study of Commercial Law), Vol. I, 1971, p. 39; Tsiridanis, *Principles of Commercial Law*, Issue A (Introduction-Commercial Transactions-Merchants), (6th edn), 1962, p. 98; Tsiridanis, *Principles of Commercial Law*, Issue B, (6th edn), 1964, p. 20; Ef. Ath.(Athens Court of Appeals) 6016/1970 *Nomiko Bima* (Law Tribune), 1980 (28), p. 531; Anastasiadis, 1949, §71, p. 207; Levandis, *Law of Commercial Companies, Commercial Personal Companies*, Vol. I, 1985, p. 92.

74 Rokas, 1974, §8, p. 21.

75 Anastasiadis, 1949, p. 248, note 14a.

76 Rokas, 1943, p. 170.

77 Rokas, 1943.

78 *See* Rokas,1943, p. 170; Andonopoulos, 1949, p. 255, No. 61; Triandafillakis, 2009, p. 19.

natural person.[79] Practically this means that the minor heir is liable with the provisions of the Law of Succession and not those of the Commercial Code.

II. The Liability of the Minor Heir

The minor heir acquires all the rights and all the obligations had by the deceased partner. But the minor with his entry into the general partnership will not be responsible for the company debts, as was the deceased partner, namely, unlimited and several liability, but will be liable as a silent partner limited up to the assets of the inheritance.[80] A justifiable reason is that the minor heir inherits from the law always with the benefit of inventory[81] (Art. 1527 GCC) even if the 4-month term for the acceptance of the inheritance has expired. The minor heir is liable for the debts, which had come about before his entry in to the company only up to the assets of the inheritance, whereas for the debts acquired after his entry he is liable unlimitedly and with his personal property.[82] The liability of a minor heir is limited and several, that is, liable to the whole of the property of the deceased partner. At this point it should be noted that the limited liability of the heir is incompatible with his liability under Article 249 of Law 4072/2012.[83]

I. Conclusion

Company participation constitutes a universal and absolute right, from which company rights and obligations originate.

Company participation is transferred with one unified act in its whole, without the requirement of separate transfer of rights and concession of obligations.

The derogation of the right to company participation bears against the company and against the organs the requirements based on Article 71 and 914 GCC. The company participation as an idiosyncratic legal relation is inherited and comes under the implication of its property GCC 1710 Section.

Conversely, in general and limited partnerships, the new Article 256 of Law 4072/2012, the corporate participation is transferred totally or partially, if so provided in the partnership agreement or agreement of all partners.

79 *See* K. Rokas, Comments on Decision of Appeal Court in Athens, in *Studies of Commercial Law*. Vol. A, 1971.

80 Alexandridou, 2007, 192, No.16; Triandafillakis, 2009, Nos. 300 and 301; Tsiridanis, 1964, pp. 57-58: "the minor heir of the general partner will be liable limitedly, namely as a silent partner (until his coming of age or until obtaining the license, under arts. 2 and 3 of Commercial law)". However, criticism has been expressed on this opinion, *see* K. Rokas, The Commercial Entity of the General Partner, Melete Emporikou Dikaiou (Studies of Commercial Law), 1971, p. 57,c'; Rokas, 1971, p. 169; Anastasiadis, 1949, p. 248, note 14a: "but a contradiction will arise that while the deceased was liable unlimitedly, the (minor) heir will be liable up to the sum of his inheritance"; Georgakopoulos, 1965, p. 44; Markou, 2010, p. 198, note 730; *see also* BGH NJW RR 1987 at 450 "... der Minderjäriger haftet hinsichtlich der Altverbindlichkeiten nur beschränkt auf den Umfang des ererbten Vermögens".

81 Ef. Pir. (Piraeus Court of Appeals) Business and Corporate Law (DEE), 2002, p. 711.

82 Anastasiadis, 1949, § 87, p. 248; Markou, 2010, p. 198, note 730.

83 C. Rokas, Commentry Eemb (Review of Commercial Law), XIV, p. 57; Markou, 2010, p. 198, note 730.

The provision for the continuation of the company not between all the heirs but between one or more of them is valid. Partial succession of the company share is allowed.

The above provision does not fall into the restriction of inheritance contracts (GCC368).

The heir comes into the whole of the legal relations of the deceased partner on the strength of his right to succession. His entry into the company comes rightfully/ipso jure from his hereditary entity and according to the provisions in the Law of Succession.

The liability of the simple heir partner is unlimited and for the former debts, whereas the liability of the heir who has accepted the benefit of inventory is limited, namely, liability only up to the assets of the inheritance and without the liability with his personal property.

No conflicts arise in the provisions of Law of succession in Articles 249 and 279 of the Greek Commercial Code (GCommC), regarding the responsibility of the company debts of the heir partner.

A minor heir comes into the company relation with the strength of his right to inherit without any other formulation and acquires rightfully his company participation, according to the provisions of Hereditary Law.

For minor heirs to become partners, it is enough that they have the ability to law, without the requirement of commercial ability for the action of commercial acts, because the acquisition of the inheritance does not have as a prerequisite the ability to transact, but the ability to Law, which the minor does not forfeit as every individual.

A minor with his entry into a general partnership company is liable for the former debts limited only until the assets of the inheritance because the minor heir inherits by the law of the benefit of inventory.